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Supreme Court of the United States

OCTOBER TERM—1930.

No. 87.

SETH M. MILLIKEN, GERRISH H. MILLIKEN and HAROLD A. HATCH, as Executors of the Last Will and Testament of Seth M. Milliken, Deceased,

Petitioners,

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITIONERS' REPLY BRIEF.

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TABLE OF CONTENTS.

	PAGE
A. Petitioners' right to raise construction issue	1
B. Lower court decisions in contemplation cases	2
C. Retroactive excise taxes	3
D. Taxability under 1916 act	4

TABLE OF AUTHORITIES.

CASES CITED.

Alice State Bank *v.* Houston Pasture Co., 247 U. S. 240	1
Billings *v.* United States, 232 U. S. 261	3
Commercial Credit Co. *v.* United States, 276 U. S. 226	1
Fourth National Bank *v.* Francklyn, 120 U. S. 747	2
Grant Bros. *v.* United States, 232 U. S. 647	2
Guaranty Trust Co. *v.* Koehler, 195 Fed. 669	2
Hecht *v.* Malley, 265 U. S. 144	3
Latham *v.* Commissioner, 16 B. T. A. 48	3
Loetscher *v.* Commissioner, 14 B. T. A. 228	3
Luscomb *v.* Commissioner, 30 Fed. (2nd) 818	3
Magruder *v.* Drury, 235 U. S. 106	2
Phillips *v.* Gnichtel, 27 Fed. (2nd) 662	3
Pollock *v.* Farmers Loan & Trust Co., 158 U. S. 601	4
Rengstorff *v.* McLaughlin, 21 Fed. (2nd) 177	3
Schoenheit *v.* Commissioner, 44 Fed. (2nd) 476	3
Shwab *v.* Doyle, 269 Fed. 321	3
Stockdale *v.* Insurance Companies, 20 Wall. 323	3
Towne *v.* Eisner, 245 U. S. 418	2
United States *v.* Railroad Co., 17 Wall. 322	4
Watts *v.* Waddle, 6 Pet. 389	2
Weems *v.* United States, 217 U. S. 349	2

STATUTES CITED.

PAGE

Revenue Act of February 24, 1919:

Sec. 401 6
Secs. 500, 800, 904, 905, 906, 907, 1000, 1001, 1100 5
Sec. 1400 ..... 4, 6
Sec. 1409 5

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REPLY BRIEF.

A. Petitioners' Right to Raise Construction Issue.

The United States challenges petitioners' right to raise before this Court the question of construction of the statute and cites as authority for its contention *Alice State Bank v. Houston Pasture Co.*, 247 U. S. 240, and *Commercial Credit Co. v. United States*, 276 U. S. 226. In both these cases the new questions raised on appeal were entirely different in their nature from the questions presented in the applications for certiorari and did not naturally arise as necessary incidents to the consideration of the issues presented in the applications for the writs. It is also to be noted that in both cases the Court decided in favor of the petitioners on the grounds presented in the applications for the writs so that consideration of additional issues was wholly unnecessary.

In the present case, however, the question of construction is one which naturally and in fact necessarily arises as a preliminary to consideration of the constitutional issue. Petitioners complain that the statute as construed and administered by the Treasury Department is unconstitutional. In considering whether or not the statute "in so far as it purports to tax" the transfer here involved is invalid (R. 1, 9, 13), the first question inevitably presented is whether there was error by the Treasury Department in construing the statute to apply to the transfer and by the Court of Claims in sustaining this construction (R. 17).

The argument advanced by the United States undoubtedly represents the general rule where the alleged errors do not involve any issues either "of a fundamental or jurisdictional character" (*Grant Brothers* v. *United States*, 232 U. S. 647, 660; *Magruder* v. *Drury*, 235 U. S. 106, 113). However, there is no rule of court or principle of law preventing the Court from considering new issues. (See *Watts* v. *Waddle*, 6 Pet. 389, 402; *Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 751.) It is a matter within the sound discretion of the Court and is not controlled by precedent (*Weems* v. *United States*, 217 U. S. 349, 362), and ordinarily such issues will be considered and decided "where they naturally arise and are pertinent to the questions at issue and to further proceedings in the trial court" (*Guaranty Trust Co.* v. *Koehler*, 195 Fed. 669, 671. See also *Towne* v. *Eisner*, 245 U. S. 418, 425, 426).

B. Lower Court Decisions in Contemplation Cases.

In addition to the present case, there have been four decisions of the lower courts including the United States Board of Tax Appeals sustaining the constitutionality of federal Acts taxing gifts in contemplation of death.

(*Schwab* v. *Doyle*, 269 Fed. 321; *Schoenheit* v. *Commissioner*, 44 Fed. (2nd) 476; *Loetscher* v. *Commissioner*, 14 B. T. A. 228 and *Latham* v. *Commissioner*, 16 B. T. A. 48.)

In *Schwab* v. *Doyle, supra*, the validity of the Act was sustained by the Circuit Court of Appeals on the ground (p. 327) that the retention of a right of revocation in connection with a transfer was of no consequence in considering the question of its taxability. Not only was that case reversed on other grounds by this Court, but the error of the ground upon which the validity of the Act was sustained by the Circuit Court of Appeals is shown by numerous later decisions of this Court.

In the *Schoenheit, Loetscher* and *Latham* cases, *supra*, the transfers were all made when the 1918 Act was in effect and the decedents died after the passage of the 1921 Act which imposed a tax at identical rates, bracket for bracket, with those imposed by the 1918 Act, whereas in the case at bar the 1918 Act in effect at the time of decedent's death imposed a tax two and one-half times as great as the 1916 Act in effect at the time of the transfer.

In the additional three cases cited by the United States on this point (*Rengstorff* v. *McLaughlin*, 21 Fed. (2nd) 177; *Phillips* v. *Gnichtel*, 27 Fed. (2nd) 662 and *Luscomb* v. *Commissioner*, 30 Fed. (2nd) 818), neither the construction of the Act nor its constitutionality was considered.

C. Retroactive Excise Taxes.

The cases cited by the United States respecting retroactive excise taxes (*Stockdale* v. *The Insurance Companies*, 20 Wall. 323; *Billings* v. *United States*, 232 U. S. 261; and *Hecht* v. *Malley*, 265 U. S. 144) do not contravene the petitioners' contention that this Court has never sustained an excise upon a fully completed past transaction or event.

In the *Stockdale* case, *supra*, four members of the Court held that the Act of July 14, 1870, was retroactive and valid; two members concurred but held that the Act of 1870 did not impose a new tax retroactively but merely provided when the tax imposed by the earlier Act should cease to be effective; and three members dissented. Furthermore, the tax there involved was an income tax (see *United States* v. *Railroad Co.*, 17 Wall. 322, 326) and therefore a direct tax, so that entire decision is in effect overruled by *Pollock* v. *Farmers Loan and Trust Co.*, 158 U. S. 601.

In the *Billings* case, *supra*, the tax was an annual tax upon the use of foreign built boats. It was enacted and went into effect *during* the year in respect of which it was first made applicable. There is no reason why an annual tax upon the continuous exercise of some privilege cannot be applied in the same manner and at the same rate for the exercise of that privilege during a part of the year as for its exercise during an entire year, and the *Billings* case decided nothing beyond this point.

The same principles control the decision in *Hecht* v. *Malley, supra*, which involved an annual tax on the privilege of doing business similarly adopted *during* the year as to which it was applied. Moreover, as the Court pointed out (p. 163), the question of constitutionality was not specifically considered.

None of these cases involves a tax upon a past completed event.

D. Taxability Under 1916 Act.

The United States now for the first time argues that if the provisions of the 1918 Act are inapplicable, the transfer should be taxed under the 1916 Act, and relies on the provision of Section 1400 (b) of the 1918 Act:

> "In the case of any tax imposed by any part of an Act herein repealed, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect *under the provisions of this Act.*" (Italics ours.)

This argument, however, is without merit. Section 1400 (a) of the 1918 Act repealed the several taxes imposed by the 1916 and 1917 Acts "subject to the limitations provided in subdivision (b)". The purpose of the provision of subdivision (b) above quoted was to make the repeal of the various taxes under the prior Acts effective each at the instant that the corresponding provisions of the new Act severally became effective.

Section 1409 of the 1918 Act provided:

> "That unless otherwise herein specially provided, this Act shall take effect on the day following its passage."

A different date was "specially provided" in respect of the taxes imposed by Sections 500, 800, 904, 905, 906, 907, 1000, 1001, and 1100, and except for the provisions of Section 1400 (b) above quoted, there would have been no tax, for example, on admissions and dues from February 24, 1919, until April 1, 1919, the effective date of Title VIII of the 1918 Act as provided by Section 800. The purpose of the above quoted provision of Section 1400 (b) was to prevent any such hiatus, and not to continue or revive a prior Act where the corresponding provisions of the 1918 Act, irrespective of any question of constitutionality, "took effect under the provisions of that Act" immediately upon its passage.

The Estate Tax provisions under Title IV of the 1918 Act took "effect under the provisions of the Act" immediately. Section 401 explicitly prescribed that the rates therein stated were to be imposed "upon the transfer of the net estate of every decedent dying after the passage of this Act". Accordingly, the above quoted provisions of Section 1400 (b) are wholly inapplicable.

Respectfully submitted,

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